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Tod Mixson

County Auditor
County Courthouse

Opinion Committee

P.O. Box 399
Orange, Texas 77631-0399

Telephone:
(409) 882-7020
Fax: (409) 883-9322

December 3, 1997

Opinions Committee
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

FILE # ML-39955-97
I.D. # 39955

Attention: Ms. Sarah Shirley, Attorney at Law

Ladies and Gentlemen:

By reference to the immediately following descriptions of facts and circumstances, I ask that your office render an Opinion with respect to the inquiries next following.

In this connection, please note that our County and District Attorney (combined offices), Mr. John D. Kimbrough, declines opinion or comment in this matter by reason of his recusal in the litigation to which it relates. Enclosed is a copy of Mr. Kimbrough's December 1, 1997 letter by which he affirms his inability to address these subject issues

FACTS AND CIRCUMSTANCES

A lawsuit has been filed in Federal district court in Beaumont, Texas, in which the plaintiff claims damages resulting from wrongful acts of Orange County's immediate past sheriff and two of his deputies (Civil Action No. 1:96CV0751 -- see enclosed). No loss of funds or personal property damage is alleged in the suit. The asserted circumstances of plaintiff's complaint indicate an association of alleged events with defendants' conduct of office, but Orange County is not named as a defendant in this or any related action.

By authorization of the Orange County Commissioners Court, the County, originally through the County Attorney's office, had provided for the defendants' defense. As noted, however, in time the County Attorney found it necessary to recuse himself, whereupon the Commissioners Court engaged the services of two local independent attorneys -- Mr. Louis Dugas and Mr. Michael Catt -- to represent the defendants. Though the County Attorney's recusal extended also to his representation of the County, the Commissioners Court engaged no other counsel for that purpose.

Subsequently, Mr. Catt (counsel for the defense) informed the Commissioners Court that the matter likely could be settled for \$10,000. The Commissioners Court, in consideration of the prospect that such a settlement would be less than the ongoing cost of defense, authorized Mr. Catt to proceed with an offer of settlement (see enclosed September 22, 1997 Court minutes [Vol. 29, Page 88]).

By letter of October 15, 1997 to County Judge Carl Thibodeaux, Mr. Catt, indicating that a \$10,000.00 settlement had been arranged, asked for the County's check in that amount made payable to the plaintiff and her attorneys. Judge Thibodeaux then delivered this letter to me, asking that I (as County Auditor) process the proposed settlement for payment.

No order affirming a settlement agreement has been entered by the Federal Court of jurisdiction, neither has any such agreement been reduced to written, executed acknowledgement between the County and any of the parties to the suit, nor has the Commissioners Court acted to acknowledge its conclusive consent to any settlement agreement, notwithstanding the Court's previously noted action to seek settlement.

As with all claims against the County, I considered how the validity of this proposed payment could be substantiated. For past determinations of whether such adversarial claims were warranted, I have relied on the advice of the County's legal representatives (usually the County Attorney's office and in some cases separately engaged attorneys). In this case, however, because the County Attorney had recused himself both as counsel for the defendants and also from representation of the County, he has declined to comment on the prospect of this claim's payment. Also, the Commissioners Court had engaged no other attorney to represent the County. Accordingly, on my own authority pursuant to the discharge of my duties of office, I engaged a local attorney, Mr. Jerry Pennington, to advise me on whether I should authorize the prospective settlement for payment.

Mr. Pennington responded to my request by his letter of November 6, 1997 (copy enclosed) in which he presents his analysis of the facts as related to his findings of related law, and concludes by saying that he "...find[s] no clear legal authority for indemnification...", and that accordingly "...[he] would not recommend issuing the check requested without further study". Based, therefore, on my inability to establish competent authority for the County's payment of the subject prospective settlement, and especially based on Mr. Pennington's assertive indication that no such authority is apparent, I have found that I am unable to approve the County's payment of the settlement.

INQUIRIES

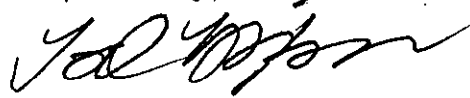
1. As an issue distinguishable from questions of the authority of the Orange County Commissioners Court to entertain the subject settlement, does Local Government Code §113.064 apply in these circumstances so as to require that I, as County Auditor, substantiate the validity of the settlement before its payment is competently ordered by the Commissioners Court? Most particularly, would this prospective payment be made in satisfaction of that which properly would be construed to be a "claim, bill, or account", as those terms are used in LGC §113.064?
2. Mr. Pennington's report notwithstanding, do you conclude that there is, or otherwise that there is not, statutory, case-law or other legal authority for the County's subject prospective payment, especially in view of the following considerations of circumstance?
 - A. As a matter distinguishable from the County's initial authority in principle to undertake subject settlement payment, might the litigants

be found, nevertheless, to have an enforceable claim for payment by reason of reliance on a construed understanding with the County?

- B. Because, in these circumstances, the County's reason for considering settlement is an estimation that it would cost less than further legal representation, might the settlement payment be construed to be made in place of, and therefore to be the effective equivalent of, the payment of private counsel according to the intent of Local Government Code §157.901?

Of course your response by way of the expression of your Opinion on these matters would be of valuable assistance to us, as Orange County officials, in our ongoing efforts lawfully to conduct the County's affairs in the public interest. Accordingly, I look forward to your response at your earliest convenience.

Respectfully,



Tod Mixson, Orange County Auditor

TM/

CC: Hon. Carl K. Thibodeaux, Orange County Judge
Hon. John John D. Kimbrough, Orange County Attorney
Mr. Jerry V. Pennington, Attorney at Law
Mr. Michael Catt, Attorney at Law
Mr. Louis Dugas, Attorney at Law

Enclosures:

County/District Attorney's letter affirming inability to comment.
"Plaintiffs' First Amended Complaint"
Orange County Commissioners Court minutes, September 22, 1997 session.
November 6, 1997 letter of Jerry V. Pennington, Attorney.



John D. Kimbrough

Orange County District Attorney

December 1, 1997

ORANGE COUNTY COURTHOUSE
801 DIVISION
ORANGE, TEXAS 77630

OFFICE: (409)883-6764
FACSIMILE: (409)883-9322

Tod Mixson
County Auditor

Re: Recusal of the County Attorney's Office

Dear Mr. Mixson:

This letter is to confirm that the County Attorney's Office has been disqualified from representing the county and any of the defendants in the litigation styled Kerns, Et Al vs. Sweeney, Et Al, Cause No. 1:96CV0751 in the United States District Court for the Eastern District of Texas.

This disqualification is the result of a conflict of interest and is mandated by the State Bar Rules.

If you need any additional information please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Kimbrough", written over a horizontal line. The signature is stylized with a large, looped "J" and "K".

John D. Kimbrough

JDK/dm

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AUDITOR'S OFFICE